In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 500

UNITED STATES OF AMERICA, APPELLANT

v.

FLOYD DIXON

STATEMENT AS TO JURISDICTION

In compliance with Rule 37(a)(1) of the Federal Rules of Criminal Procedure and Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order of the District Court in this cause dismissing the indictment.

OPINION BELOW

The opinion of the District Court dismissing the indictment has not been reported. A copy of the opinion is attached hereto as an Appendix.

JURISDICTION

The order of the District Court dismissing the indictment was entered on October 21, 1953. The

jurisdiction of the Supreme Court to review on direct appeal the order of the District Court dismissing an indictment, based on a construction of a statute upon which the indictment was founded, is conferred by 18 U. S. C. 3731. See also Rules 37(a)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether the statute on which the indictment was founded, 26 U. S. C. 3116, is merely preventative and remedial or whether it defines a criminal offense, the penalties for which are prescribed in 26 U. S. C. 3115.

STATUTES IN QUESTION

Sections 3115 and 3116 of the Internal Revenue Code provide:

> Sec. 3115. Penalties
>
> (a) Violations as to operation of plants or unlawful withdrawal of taxable alcohol. Whoever operates an industrial alcohol plant or a denaturing plant without complying with the provisions of this part and lawful regulations made thereunder, or whoever withdraws or attempts to withdraw or secure tax free any alcohol subject to tax, or whoever otherwise violates any of the provisions of this part or of regulations lawfully made thereunder shall be liable, for the first offense, to a penalty of not exceeding $1,000, or imprisonment not exceeding thirty days, or both, and for a second or cognate offense to a penalty of not less than $100 nor more than $10,000, and to imprison-

ment of not less than thirty days nor more than one year. It shall be lawful for the Commissioner in all cases of second or cognate offense to refuse to issue for a period of one year a permit for the manufacture or use of alcohol upon the premises of any person responsible in any degree for the violation.

(b) Violations in general. Any person violating the provisions of this part or of any regulations issued thereunder, for which offense a special penalty is not prescribed, shall be liable to the penalty or penalties prescribed in subsection (a). It shall be the duty of the prosecuting officer to ascertain, in the case of every violation of this part or the regulations made thereunder, for which offense a special penalty is not prescribed, whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment.

(c) Previous conviction. If any act or offense is a violation of this part, and also of any other law in regard to the manufacture or taxation of, or traffic in, intoxicating liquor, a conviction for such act or offense under the one shall be a bar to prosecution therefor under the other. 53 Stat. 362.

Sec. 3116. Forfeitures and seizures

It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall exist in any such

liquor or property. A search warrant may issue as provided in title XI of the Act of June 15, 1917, 40 Stat. 228 (U.S.C. Title 18, §§ 611-633), for the seizure of such liquor or property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal-revenue laws, or of any other law. The seizure and forfeiture of any liquor or property under the provisions of this part, and the disposition of such liquor or property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such liquor or property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal-revenue laws. 53 Stat. 362.

STATEMENT

On September 9, 1953, an indictment in one count charging a violation of Sections 3115 and 3116 of the Internal Revenue Code was returned against defendant in the District Court for the Northern District of Georgia. The indictment charged the defendant with the possession of property (parts of a still and distilling materials) intended for use in violating the provisions of the internal revenue laws.

The District Court granted the defendant's motion to dismiss the indictment. In its opinion, it held that Section 3116 is preventive and remedial rather than criminal, and that it does not define a criminal offense.

THE QUESTION IS SUBSTANTIAL

In holding that Section 3116 of the Internal Revenue Code is merely preventive and remedial rather than criminal, and that it does not define a criminal offense, the decision below seriously hampers the effective administration and enforcement of the internal revenue laws with respect to liquor. The primary purpose in enacting this section was to condemn attempts to violate the internal revenue laws, especially the setting up of illicit distilleries. Enforcement officers frequently had knowledge that known violators were assembling parts of a still, equipment, and paraphernalia for illicit distilling, etc., but had to wait until the still was actually assembled or in operation before anything could be done about it. It was intended that the possession of these items with intent to violate the internal revenue law be punished.

This intent is plainly embodied in the statute Congress enacted. Section 3116 of the Internal Revenue Code makes it "unlawful to have or possess any liquor or property intended for use in violating (Part II, Subchapter C ("Industrial Alcohol"), of Chapter 26 ("Liquor")), or the internal revenue laws, or regulations prescribed under such laws * * *." Section 3115(b) provides that "Any person violating the provisions of this part (which includes Section 3116) * * *, for which offense a special penalty is not prescribed, shall be liable to the penalty or penalties prescribed in subsection (a)." Thus, Section 3116 clearly defines a criminal offense the penalty for which is

fixed by Section 3115. The identical language in Section 25 of the National Prohibition Act was treated as a criminal statute in several cases. *Morgan* v. *United States*, 294 Fed. 82 (C. A. 4); *Patrilo* v. *United States*, 7 F. 2d 804 (C. A. 8); *Adamson* v. *United States*, 296 Fed. 110 (C. A. 5). And we are aware of no case, other than the instant one, which holds that Section 3116 does not define a criminal offense. On the contrary, two district courts have specifically held that it is a criminal statute. *United States* v. *Harvin, et al.*, 91 F. Supp. 249 (E. D. Va.); *United States* v. *Blair*, 97 F. Supp. 718 (E. D. Ky.). The Fourth Circuit also has affirmed a criminal conviction under this statute. *Godette* v. *United States*, 199 F. 2d 331.

Both the District Court for the Eastern District of Virginia in *United States* v. *Harvin, supra*, and the District Court for the Eastern District of Kentucky in *United State* v. *Blair, supra*, pointed out that the having or possession of property intended for use in violating the internal revenue laws is made "unlawful" by Section 3116. Both courts recognized that Section 3115 penalizes the violation of the provisions of Part II of the Act, which includes 3116. "Together they define a crime, 3116 describing the unlawful act, 3115(a) prescribing the punishment." 91 F. Supp. at 250; 97 F. Supp. at 719.

The court below, in the instant case, appears to have based its ruling on the language used by the Fifth Circuit in *Kent* v. *United States*, 157 F. 2d 1, 2, where the court said:

> The seizure for forfeiture here is not in consequence of or in punishment for a crime, but to prevent one. The proceeding is preventive and remedial, rather than punitive or criminal.

However, the issue of whether or not Section 3116 was a criminal measure was not before the Fifth Circuit. The "proceeding" before it was simply an action *in rem* for the forfeiture of the property that had been seized, as was the situation in the other cases cited by the Court below. As a matter of fact, in *Adamson* v. *United States, supra*, the Fifth Circuit treated the same provision in the National Prohibition Act as a criminal measure.

The doubt concerning the intendment of the statute as a criminal measure seems to stem from the fact that in proscribing the possession of the property held with intent to violate the liquor laws, no penalty is prescribed within the confines of Section 3116 itself, although it does provide that no property rights shall exist in such property, thereby, in effect providing for its forfeiture. There is, however, nothing unusual about a pattern of legislation by which certain acts are made unlawful by one section of a statute and the penalty for such unlawful conduct is prescribed by another. Thus Section 15 of the Fair Labor Standards Act (29 U. S. C. 215) makes it unlawful for any person to violate certain other sections of the Act, and then Section 16(a) imposes a criminal penalty on any person willfully violating Section 15. In the Internal Revenue Code itself, with relation to nar-

cotics, Sections 2553 and 2554 make certain acts unlawful, and the penalty is prescribed by Section 2557(b) as to "Any person who violates or fails to comply with any of the requirements" of the statute. That is the pattern which was followed in the National Prohibition Act (see *Page* v. *United States*, 278 Fed. 41, 44 (C. A. 9), certiorari denied, 258 U. S. 627) and was carried over into the statute here involved.

This conclusion, clear enough from the statutory language, is confirmed by the legislative history. Section 3116 is derived from the Act of August 27, 1935, the Liquor Law Repeal and Enforcement Act, 49 Stat. 872. A similar provision, making it unlawful to have or possess any liquor or property intended for use in violating the provisions of the National Prohibition Act, along with several other provisions of that Act, had fallen with the repeal of the Eighteenth Amendment. That Section 8 of the Liquor Law Repeal and Enforcement Act, from which Section 3116 of the Internal Revenue Code is derived, was intended to fill one of the gaps left by the repeal of the National Prohibition Act and to condemn, with criminal sanctions, attempts to violate the internal revenue laws, is clear from the legislative history.

During the hearings before the Senate Committee on the Judiciary, Mr. V. Simonton, a Treasury Department representative who had to do with the drafting of the provision in question was asked by the Chairman of the Committee to point

out new legislation in the bill. He explained its purpose and intent as follows:

Mr. SIMONTON: The old act read in section 25:

"It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this title."

We have extended that to include the possession of liquor or property intended for use in violating the provisions of Title III of the National Prohibition Act and of the Internal-revenue laws. For the first time we have proposed legislation condemning an attempt to violate the internal-revenue laws.

At the present time it is not an offense against the United States to attempt to violate the internal-revenue laws. It is a conspiracy, of course, but an attempt to do so is not strictly a violation of the law.

The CHAIRMAN: What do you declare to be an attempt?

Mr. SIMONTON: Assembling parts of a still, assembling barrels, paraphernalia, cracking plant. We know all those things are being done. We know of a place in New Jersey where they have a dozen stills being assembled.

The CHAIRMAN: And the evidence of the intent might be manifested by the nature and amount of assembled material?

Mr. SIMONTON: Yes, the surreptitious handling of it. Now we have to wait until the still is assembled and set up before we can do any-

thing. This proposed provision is along the line of modern legislation.

We submit that the statute Congress enacted clearly accomplishes the objective of its proponents. The history shows that Congress intended to define an offense in Section 3116. Plainly covered by the punishment provisions of Section 3115, the conduct described in Section 3116 is a crime against the United States.

It is submitted that the decision of the District Court is erroneous and that the question presented by this appeal is a substantial one which should be settled by the Supreme Court.

Respectfully submitted,

(S.) ROBERT L. STERN,
Acting Solicitor General.

APPENDIX "A"

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA AND ORDER DISMISSING INDICTMENT—Filed October 21st, 1953

The defendant, Floyd Dixon, has moved for a dismissal of the indictment in the above stated case upon the ground that Section 3116 of Title 26 U. S. C. A., upon which the indictment is based is preventative and remedial rather than criminal, and that therefore the indictment fails to charge an offense against the laws of the United States.

The contention of the defendant seems to be sustained by the federal appellate courts. In the case of Kent v. U. S. (Fifth Cir.), 157 F. 2d 1, the Court said:

> "The seizure for forfeiture here is not in consequence of or in punishment for a crime, but to prevent one. The proceeding is preventative and remedial, rather than punitive or criminal."

On a motion for rehearing in the above case, wherein it was urged that the proceeding for forfeiture should be treated as a criminal case on the ground that the opinion in the case of Boyd v. U. S., 116 U. S. 616, required the forfeiture to be so treated, the Court said:

> "We do not think so. In Boyd's case a criminal offense was directly involved and must have been committed to cause the forfeiture . . .
>
> "In this case no crime was committed."

The above holding is construed as a holding by the Court of Appeals for this Circuit that Section 3116 of Title 26, U. S. C. A., does not define a criminal offense. See also, Anderson v. U. S. (Fifth Circuit), 158 F. 2d 196; U. S. v. One Plymouth Coupe, 88 F. Supp. 93. Since the question was not raised in that case, the case of Goddette v. U. S., 199 F. 2d 331, is not authority to the contrary.

This Court being of the opinion that Section 3116 of Title 26, U. S. C. A., is preventative and remedial rather than criminal, and that it does not define a criminal offense, it is

ORDERED that the motion of the defendant to dismiss the indictment be, and the same is hereby granted, and said indictment is hereby dismissed.

This the 21st day of October, 1953.

(S.) BOYD SLOAN,
United States District Judge.

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